

**In the Supreme Court  
of the United States**

OCTOBER TERM, 1976

No. **76-112**

UNITED STATES OF AMERICA,

*Respondent,*

v.

WEYERHAEUSER COMPANY, a Washington  
corporation; CROWN ZELLERBACH  
CORPORATION, a Nevada corporation,

*Petitioners.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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FOR THE NINTH CIRCUIT**

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Petitioners pray for a writ of certiorari to review  
the judgment of the United States Court of Appeals  
for the Ninth Circuit, filed June 14, 1976.

**OPINIONS BELOW**

A copy of the opinion of the District Court for the  
District of Oregon on the segregated issue in the pre-  
trial order is attached as Appendix B, and is found in

the Record on Appeal, R. pp. 141-152.

The opinion of the Court of Appeals affirming the trial court's order (R. 170-171) is not yet reported. A copy is attached as Appendix A.

### **JURISDICTION**

The judgment of the Court of Appeals was entered June 14, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **QUESTION PRESENTED**

The issue presented is whether, in determining the just compensation to be paid for the taking by the United States of a forest access road, consideration may be given to the loss of income which otherwise would have been received for use of the road in the harvesting of federal timber.

### **STATEMENT OF THE CASE**

#### **1. Nature of the case; proceedings and disposition in the lower courts.**

This is an eminent domain action brought by the United States to condemn a perpetual easement over portions of a forest access road located on lands owned by defendants in Clackamas County, Oregon "for use by the United States of America and its assigns, licensees and permittees. . . ." (R. p. 4). The District

Court entered a pretrial order (R. p. 45) segregating for separate trial by the court the following issue relating to "just compensation":

"Whether, in determining the just compensation due defendants in this action, consideration may be given to the reduction in value, if any, of defendants' lands in the Molalla Watershed resulting from the loss of the opportunity to obtain payments for use of the condemned road for removal of Federal timber." (R. p. 50).

The relevant facts necessary to a determination of the issue were agreed to by the parties and set forth in the pretrial order. Following the filing of briefs and oral argument, the trial court decided this issue in favor of the Government and against the defendant landowners (R. 141). The District Court certified the issue for appeal under 28 U.S.C. § 1292(b), and the Court of Appeals thereafter granted leave to appeal.

#### **2. Statement of relevant facts.**

The facts necessary to an understanding of the controlling question of law determined by the Court of Appeals are set out in the Pretrial Order for Proceeding under Rule 42(b) (R. pp. 46-51). The Molalla Road is a 28-mile road system constructed prior to 1950 to provide access to timberlands in an area in Western Oregon known as the Molalla Watershed. The timberlands served by the road are owned primarily by the United States, Weyerhaeuser Company (hereafter "Weyerhaeuser") and Crown Zellerbach Company (hereafter "Crown") in intermingled checkerboard



ownership patterns. The intermingled federal timberlands are predominantly "O & C" lands described below. Eight miles of the Molalla Road are located on lands owned by the United States and the remaining 20 miles on lands owned by petitioners. All but one of the entire 28-mile road was privately financed and constructed prior to 1950, and was thereafter maintained by petitioners and their predecessors in interest.

In 1950 the United States Department of the Interior adopted regulations pertaining to rights of way for logging roads covering the "revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands," commonly known as "O & C" lands (43 C.F.R. § 115.154 et seq., Ex. C, R. p. 69). These recognized the interdependence of the federal government and private owners for access to timberlands in each ownership, and the need to solve the problems of forest land management in areas such as the Molalla Watershed, where these timberland ownerships are intermingled in a checkerboard fashion.

These regulations provided a procedure by which the Government, as a condition to granting rights of way over Government land, may require that the capital cost and maintenance of a road system serving the needs of the United States and private owners be allocated among all owners in proportion to the use each has made, or probably will make, of the road system in the removal of its timber. This result is achieved by means of reciprocal right-of-way agreements and calculations of the volume of timber in each ownership

which is logically "tributary" to the road, including timber previously removed. The capital cost of the road is then amortized over the total volume of such tributary timber, and each party, including the United States, thereafter bears its share of the maintenance and contributes to the capital cost of road segments owned by other parties in a proportion equal to its use of the road until its "share" of the capital cost has been discharged. (Exs. C and D, R. pp. 69, 76).

In 1953 petitioners and the United States entered into reciprocal right-of-way agreements providing for use of the road by each of the parties and their licensees, including purchasers of Government owned timber, during the ensuing 20 years. The contract provided for payment of road use fees but did not expressly incorporate the cost-sharing formula authorized by the regulations, possibly because, as noted by the District Court, the parties believed most of the federal timber would be removed by 1973, when the contracts would have expired. However, as set forth in the pretrial order, the parties agree that as of the date of taking "it was reasonably probable that a significant volume of Federal tributary timber would be removed over the Molalla Road in the future. . . ." On this subject, the Court of Appeals said:

" . . . The district court found, and there is little doubt, that absent condemnation a new road use agreement would have been signed. Substantial amounts of federal timber remain for harvesting in the Molalla watershed area. Although the government is not bound to use Molalla Road, the regulations governing such road use permits

for these timberlands establish a preference for the use of existing roads when such roads are of sufficient capacity."

A new road agreement would presumably have taken the form prescribed by the regulations and, thus, would have resulted in acquisition by the Government of an interest in the road in consideration for its agreement to pay its remaining share of the capital costs, as computed under the regulations. Based on petitioners' calculations of tributary timber of each owner which has been removed or probably will in the future move over the Molalla Road, and giving the United States credit for all federal timber previously removed, as required by the regulations, its remaining share of the capital cost of the segments of condemned road which would have been paid under the BLM formula, absent condemnation, amounts to in excess of \$300,000. It is the opinion of petitioners' appraisers that, absent the condemnation, a prospective purchaser of petitioners' lands, including the Molalla Road, would have taken this factor into consideration and given it weight in arriving at his opinion of fair market value. On the other hand, the appraisers employed by the United States, acting under instructions not to consider the above factor, have arrived at an appraisal figure representing only the bare land value underlying the road segments, as indicated by the Government's deposit in the Registry of the District Court of only \$20,431. Thus, the net result is to deny to petitioners any compensation for the value of the road improvements taken by the United States.

While we cannot say with certainty that the new road agreement which would have been made in the absence of a condemnation would have followed the regulations — for example, it might have provided for the payment of tolls like the 1953-1973 agreement — certainly it would in some way have recognized the strategic value of the condemned road system for the removal of tributary timber from adjoining federal lands. The decisions below declare this value noncompensable. Thus, the issue raised by this petition is in no way affected by the precise form which a successor to the 1953-1973 agreement would have taken.

### 3. The decision of the Court of Appeals.

The Court of Appeals for the Ninth Circuit affirmed the District Court's ruling which removed from "just compensation" the prospect of any further contribution by the United States to petitioners' capital costs incurred in building the Molalla Road. The court justified the exclusion of anticipated Government road use payments as a factor in determining fair market value by applying the principle of *United States v. Cors*, 337 U.S. 325 (1949), "... excluding enhancement of value resulting from the Government's special or extraordinary demand for the property."



## REASONS FOR ALLOWING THE WRIT

1. **The Court of Appeals' Decision Determines An Important and Clear-Cut Issue of Law That Is Fundamental to the Further Conduct of This Case. More Important, It Concerns a Recurring Problem Arising in Determining Just Compensation in Federal Condemnation Proceedings. This Case Directly Presents Questions as to the Proper Limits of United States v. Cors, 337 U.S. 325 (1949), as Applied to Property Condemned Which Is, Because of Its Location, Well Suited to Provide a Service to Multiple Owners of Land Intermingled in Checkerboard Fashion.**

It is obvious that both the District Court and the Court of Appeals were troubled by the requisites for application of *Cors* to this case. The District Court used this language:

"... I am somewhat haunted by the guiding philosophy of *Cors*, which proclaimed 'fairness' to be the principle underlying exceptions to the market-value rule. In seeking to protect the government from a 'hold-up', I may inadvertently reward the real bandit."

The Court of Appeals did not go so far, but said:

"... The focal point of the 'special or extraordinary' standard is that values resulting from the *urgency* or *uniqueness* of the government's need for the property or from *the uniqueness of the use to which the property will be put* do not reflect what a willing buyer would pay to a willing seller. While we do not agree with the government's contention that any need it may have is

special or extraordinary, *it is clear that government projects may render property valuable for a unique purpose*. Value for such a purpose, if considered, would cause 'the market to be an unfair indication of value,' *United States v. Cors*, supra, 337 U.S. at 333, because there is no market apart from the government's demand." [emphasis added]

This case does not fit the "special or extraordinary" standard of *Cors*. There is nothing unique about the intermingled ownership pattern of private and federal forest lands. This Court may take judicial notice that in states west of the 100th meridian, there are many millions of acres of lands in federal ownership and management which are intermingled in checkerboard fashion with private lands, so that neither can be reached for management purposes without crossing the lands of the other owners. Such examples abound in the states of Washington, Oregon, Idaho, Montana, Wyoming, Nevada, New Mexico, Arizona and California.

Neither is there anything unique in the fact that the O & C lands are to be managed for sustained timber yield. This basic principle of timberland management by both governmental agencies and many private owners has been generally accepted for many years.

Thus, the problems of access over intermingled privately and publicly owned timberlands in the Molalla Watershed have their counterparts all over the West, where both federal and private timberlands are managed for sustained yield purposes. In the management

of federal timberlands, the Government acts as proprietor, exactly as do private owners, such as petitioners, whose timberlands are intermingled with those of the United States. The need for cooperation in achieving access to those lands is no different than if the O & C lands were privately owned.

The result of the lower court decisions here is that the Government is allowed to condemn a valuable forest road system from petitioners on a basis that rewards the Government for taking the property. Absent condemnation, the Government would have continued to use the road on a cost-sharing basis for removal of its timber. This factor of value is now excluded from consideration at trial only because of the mistaken view that the Government's need is unique, special or extraordinary.

But the Government's need for the Molalla Road was not on that account any more "special" or "extraordinary" than its need for any other property taken for public use. Obviously, it needed access to its timberlands, just as Weyerhaeuser and Crown needed access to theirs; but its election to condemn an easement in the existing road in preference to continuing on a cost-sharing basis with petitioners, or acquiring a right of way and building a road of its own, clearly was dictated not by the need to own the road but rather by a desire to avoid making any further contribution to the capital cost of construction.

*United States v. Cors*, 337 U.S. 325 (1949) does not justify such an inequitable result. Unlike *Cors*, the

element of value at issue here did not arise from any need of the Government to acquire an easement in the Molalla Road. On the contrary, it arose from the economical service the road could provide to the owners of tributary timber, and, therefore, the probability that the Government would elect to continue the cost-sharing arrangement. In good conscience, the Government, having elected to continue using the Molalla Road, ought not to be permitted to avoid its cost-sharing obligations through the expedient of condemnation.

**2. The Decision of the Court of Appeals Is in Conflict with *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973), *United States v. Miller*, 317 U.S. 369 (1943) and *Olson v. United States*, 292 U.S. 246 (1934), and is Inconsistent with *United States v. Fuller*, 409 U.S. 488 (1973).**

In *Almota* this Court reaffirmed two basic tenets of "just compensation," i.e., (1) that value is normally ascertained from what a willing buyer would pay in cash to a willing seller, and (2) that the Government should not be allowed to escape paying what a willing buyer would pay for the same property. To do so would run counter to what this Court noted as "[t]he constitutional requirement of just compensation [which] derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law." (409 U.S. at 478.) Applying those rules it held that the reasonable expectancy that the landowner's lease would be re-



newed was entitled to consideration in valuing the improvements.

In *Miller and Olson*, this Court held that enhanced values of property, although arising in part from governmental activity not related to intended acquisition by the Government, were entitled to consideration.

Each of these principles was applicable here, but was rejected by the District Court and the Court of Appeals.

The *Fuller* case is not directly in point, since petitioners are not claiming damages for the loss of the right to use segments of the Molalla Road built on Government land under BLM permits. If they were, there would be an analogy to this Court's rejection in *Fuller* of "... elements of value that the Government has created or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain." (409 U.S. at 492.) However, as to petitioners' privately owned road segments involved here, unlike *Fuller*, the Government could not, under any authority other than eminent domain, destroy the elements of value inherent in their ability to provide economical access to all logically tributary timber. The application of the *Fuller* case here lies in its differentiation between noncompensable values added to fee lands by a revocable permit authorizing use of neighboring Government lands, and compensable values arising simply from proximity and ability to provide a service to other property. The Court of Appeals' ruling here is inconsistent with *Fuller* in ig-

noring proximity and holding that the Government's desire as a proprietor of land to use an improvement on intermingled private property renders that element of value noncompensable.

Thus, this case turns on "location value," for which the Government must pay. As stated by Mr. Justice Rehnquist writing for the Court in *Fuller* (409 U.S. at p. 493):

"... The Government may not demand that a jury be arbitrarily precluded from considering as an element of value the proximity of a parcel to a post office building, simply because the Government at one time built the post office."

In the case at bar, petitioners rely upon the proximity of the condemned road system to the Government's tributary timber. Yet, the lower courts have now held that the Government is relieved from paying "location value," measured by probable payments for use of the condemned road for removal of federal timber.

The lower court decisions now put petitioners in a worse position than if they had dealt with a private buyer. This is contrary to the Court's admonition in *Almota Farmers Elevator & Warehouse Company v. United States*, 409 U.S. at 478 (1973).

To allow the Court of Appeals' decision to stand can only encourage the Government in further attempts to condemn private forest access roads in the Western states at unfair values substantially less than just compensation to the owners. If that portion of

the value of a condemned road which is attributable to the road's usefulness for the removal of federal timber (or, for that matter, any other natural resource of which a government happens to be the owner) is noncompensable, then, a condemning governmental agency will always be able to acquire it for a compensation less than market value. Such a discount in favor of governmental condemnors, which the decisions below appear to sanction, is contrary to the constitutional requirement that compensation be "just." In addition, by allowing such a discount, the decisions below may have sounded the death knell of the method of sharing road costs embodied in the O & C regulations and the corresponding regulations of the U. S. Forest Service; for why would an agency ever want to pay its fair share of the cost of a joint use road when it could condemn it for less?

### CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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### APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

v.

WEYERHAEUSER COMPANY, a Washington  
corporation; CROWN ZELLERBACH  
CORPORATION, a Nevada corporation,  
Defendants-Appellants.

No. 75-1301

### OPINION

Appeal from the United States District Court  
for the District of Oregon

Before: WALLACE and KENNEDY, Circuit Judges,  
and BOHANON,\* District Judge

WALLACE, Circuit Judge

The United States brought a condemnation action against Weyerhaeuser Company (Weyerhaeuser) and Crown Zellerbach Corporation (Crown) to secure an easement over portions of an existing forest access road used for hauling timber. Weyerhaeuser and Crown had been receiving payments from the government for use of the road in the removal of federal tim-

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\* Honorable Luther L. Bohanon, United States District Judge, Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

ber. They claimed that just compensation includes an element of value arising from the expectancy of continued government payments for use of the road for timber removal. The district court segregated this issue for separate trial pursuant to Rule 42(b), Fed. R. Civ. P., and rejected the claim that such value should be considered. The district judge also declared that the issue involved a controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal of this interlocutory order might materially advance the litigation. We agreed and, pursuant to 28 U.S.C. § 1292(b), granted the petition of Weyerhaeuser and Crown for leave to appeal. We affirm.

Weyerhaeuser and Crown own large amounts of timberland in the Molalla watershed area of Oregon. The only other substantial owner is the United States. The government granted these lands to the Oregon and California Railroad in 1866. They were subsequently revested in the United States as unsold lands pursuant to the Chamberlain-Ferris Act. Act of June 9, 1916, ch. 137, 39 Stat. 218. In 1937, Congress declared that these lands were to be managed as part of a "sustained yield timber program" for the benefit of dependent communities. Act of August 28, 1937, ch. 876, Title I, § 1, 50 Stat. 874 (codified as 43 U.S.C. § 1181a). In order to protect watersheds and maintain economic stability in the area, long-term federal timber yields were guaranteed by limiting the maximum harvest to the volume of new timber growth.

Successful management of the government timber program is complicated by intermingled ownership of the land in a checkerboard pattern. The government timber is essentially landlocked in this area. Access was provided in the 1940's when the 28-mile Molalla Road was constructed. Except for one mile, it was financed and built by Weyerhaeuser, Crown and their predecessors in interest. Eight miles of the road cross government lands. It is the remaining 20-mile portion owned by Weyerhaeuser and Crown which is the subject of this action.

The United States granted Weyerhaeuser, Crown and their predecessors fixed term permits to build the road across the government land. By the time the permits had expired, the Department of the Interior had adopted new regulations governing such arrangements. 43 C.F.R. §§ 115.154 *et seq.* (Supp. 1952), *as amended*, 43 C.F.R. §§ 2812.0-3 *et seq.* (Supp. 1975). One purpose of the new regulations was to prevent monopolization of access to federal timber lands. To effectuate that purpose, the regulations provided that the Bureau of Land Management (BLM) may refuse permits to private timber owners to cross federal lands unless reciprocal permits for use of private roads are obtained. 43 C.F.R. § 115.162 (Supp. 1952), *as amended*, 43 C.F.R. § 2812.3 (Supp. 1975).

New agreements governed by these regulations were negotiated in 1953 to expire December 31, 1973. The agreements granted the government and its licensees and Weyerhaeuser and Crown reciprocal non-ex-



clusive licenses over the portions of the Molalla Road on their respective lands. In addition, the government was to pay Weyerhaeuser and Crown road use fees based on quantities of timber removed over the road and the distance hauled. The agreements expressly provided that no interest in the land was created and that the payment of road use fees was not a contribution to the construction costs of the road. The district judge found that in 1953 the parties assumed most of the timber would be removed by 1973, but that it is now probable that a significant volume of federal timber remains to be removed over the road. The government acquired no vested right to use of the road after expiration of the agreements.<sup>1</sup>

Nineteen months before the expiration of the last road use agreement, the federal government con-

<sup>1</sup> The permits in question do not themselves create any property interest. We have held that revocation of such permits does not give rise to Fifth Amendment liability. *United States v. 87.30 Acres of Land*, 430 F.2d 1130 (9th Cir. 1970); *Acton v. United States*, 401 F.2d 896 (9th Cir. 1968), cert. denied, 393 U.S. 1121 & 395 U.S. 945 (1969); cf. *United States v. Rands*, 389 U.S. 121 (1967). Recently the Supreme Court said, in relation to Taylor Grazing Act permits:

[T]he Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain.

*United States v. Fuller*, 409 U.S. 488, 492 (1973). In the case before us the granting of these permits and the renewing of the agreements is in the discretion of the BLM and the Secretary of the Interior. 43 U.S.C. § 956; 43 C. F. R. § 2812.6-1(a) (Supp. 1975). This case is thus distinguishable from claims for compensation arising out of renewal interests in leases. See *Alamo Land & Cattle Co. v. Arizona*, — U.S. — (1976); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973).

demned a perpetual easement in the roadway. The condemnation reserved to Weyerhaeuser and Crown the right to free use of the road subject to payment of proportional maintenance expenses and permitted them to continue collecting the road use fees provided for in the prior agreement until it expired.

In support of their claim that the condemnation award should include compensation for the probable receipt of future payments for government use of the condemned road, Weyerhaeuser and Crown argue persuasively that a willing buyer would pay a substantial price for that expectancy. The district court found, and there is little doubt, that absent condemnation a new road use agreement would have been signed. Substantial amounts of federal timber remain for harvesting in the Molalla watershed area. Although the government is not bound to use Molalla Road, the regulations governing road use permits for these timberlands establish a preference for the use of existing roads when such roads are of sufficient capacity. 43 C.F.R. § 2812.0-6(a) (Supp. 1975). In addition, it appears that in this case the government will be obliged, pursuant to the sustained yield program, to harvest federal timber in the region on a continuing basis for some time in the future. 43 U.S.C. § 1181a.

Despite the probable continuing government road use, the question remains whether this expectation is compensable. The essence of "just compensation" guaranteed to Weyerhaeuser and Crown by the Fifth Amendment is fairness. See *United States v. Cors*, 337

U.S. 325, 332 (1949). Just compensation has often been said to be the fair market value of the property taken, or what a willing seller could receive from a willing purchaser. *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973); *United States v. Miller*, 317 U.S. 369, 374 (1943).

Fair market value takes into consideration

[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future . . . to the full extent that the prospect of demand for such use affects the market value while the property is privately held.

*Olson v. United States*, 292 U.S. 246, 255 (1934).

Weyerhaeuser and Crown contend that pursuant to *Olson*, they must be compensated for the increment in value resulting from anticipated government road use payments. The fair market value standard does not, however, compel consideration of all possible factors which might enhance the value of the property condemned. *United States v. Fuller*, 409 U.S. 488, 491 (1973); *United States v. Miller*, *supra*, 317 U.S. at 374. A property's special adaptability to an owner's needs and its special value to the condemnor are elements which have been excluded in order to render the assumed market free from unfair influences. *United States v. Cors*, *supra*, 337 U.S. at 333; *United States v. Miller*, *supra*, 317 U.S. at 375; see *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913).

The Supreme Court has recognized the existence of a "principle which excludes enhancement of value resulting from the government's special or extraordinary demand for the property." *United States v. Cors*, *supra*, 337 U.S. at 333. In *Cors* the government had requisitioned a tugboat during World War II pursuant to a statute requiring payment of "just compensation." The government's wartime need for such vessels and its requisitioning program had driven up the market price. The Court of Claims awarded compensation based upon this enhanced market value. The Court recognized that fairness precluded the payment of "hold-up value" created by the emergency needs of the government. *Id.* at 333-34.

Weyerhaeuser and Crown contend that the *Cors* "special or extraordinary demand" standard applies only to emergencies or unusual events. Thus they argue that no "holdup value" is sought here, there being nothing, in their view, special or extraordinary about the government's need in this case. This is too narrow a reading of *Cors*.

The Court in *Cors* stated the general principle that "[i]t is not fair that the government be required to pay the enhanced price which its demand alone has created." 337 U.S. at 333; see *Carlstrom v. United States*, 275 F.2d 802, 808-09 (9th Cir. 1960); *J. A. Tobin Construction Co. v. United States*, 343 F.2d 422 (10th Cir.), *cert. denied*, 382 U.S. 830 (1965); *United States v. Michoud Industrial Facilities*, 322 F.2d 698, 708-09 (5th Cir. 1963), *cert. denied sub nom. Board of Commissioners v. United States*, 377 U.S. 916



(1964); *United States v. 158.76 Acres of Land*, 298 F.2d 559 (2d Cir. 1962). The focal point of the "special or extraordinary" standard is that values resulting from the urgency or uniqueness of the government's need for the property or from the uniqueness of the use to which the property will be put do not reflect what a willing buyer would pay a willing seller. While we do not agree with the government's contention that any need it may have is special or extraordinary, it is clear that government projects may render property valuable for a unique purpose. Value for such a purpose, if considered, would cause "the market to be an unfair indication of value," *United States v. Cors*, *supra*, 337 U.S. at 333, because there is no market apart from the government's demand.

In the case before us the district court found that the government has been and will be the only road use customer:

[T]he government is the only participant. Apparently defendants have never exacted fees for use of the Molalla Road from any party except the government. There is some timberland in the Molalla Watershed owned by third parties, but it is relatively small and there is no reasonable probability that a harvest of those lands would require use of the condemned roads.

Our brothers of the Fourth Circuit were faced with a similar fact situation in *United States v. Whitehurst*, 337 F.2d 765 (4th Cir. 1964). There, the property owner had a truck farm next to a naval air station. The government bought from the landowner extensive

amounts of sand for construction of runways. When the United States condemned part of the land (including the sand pit) in order to extend the runways for jet traffic, the landowner contended that a portion of his land should be valued as a sand pit. The court found that the pit's only customer had been and would be the government and said:

Mere physical adaptability to a use does not establish a market. *In ascertaining the demand, the requirements of the Government for the project for which the land is taken must be totally excluded.*

*Id.* at 772 (footnotes omitted; emphasis in original). The court also refused to permit government purchases of sand for the original project to be admitted as evidence of a market for use of the property as a sand pit. The fact that the naval air station did not originally intend to extend the runways onto the condemned land (as here the timber management project did not originally contemplate seizure of the road) did not change the result. In the case before us, "the requirements of the Government for the project for which the land is taken" are precisely the future uses of the road for which Weyerhaeuser and Crown now seek compensation.

We find *Whitehurst* persuasive and see no reason to create an inter-circuit conflict. No other potential purchasers of Molalla Road could have been anticipated road use customers; certainly the government is the only participant in the market with a need for access for the erosion prevention, sustained yield harvesting and public recreation purposes embodied in the



sustained yield program. 43 U.S.C. § 1181a. As the BLM regulations recognize, ready access to these timberlands is pivotal to the economic success of the sustained yield program. 43 C.F.R. §§ 2812.0-6(b), (c) (Supp. 1975). These facts bring this case within the scope of the *Cors* decision. We therefore agree with the district court that the case presents a "special or extraordinary" situation or "an element of value which the government has created" and that a fair market would not include that value arising from the government's activity.

AFFIRMED.

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

WEYERHAEUSER COMPANY, a Washington  
corporation, and CROWN ZELLERBACH  
CORPORATION,

Defendants.

Civil No. 72-387

OPINION

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SKOPIL, Judge:

The United States brings an action for condemna-

tion of an easement over those portions of a forest access road ("Molalla Road") which are owned by defendants. Jurisdiction is under the Act of August 1, 1888, (25 Stat. 357; 40 U.S.C. § 257 (1970)), and its amendments and supplements: the Act of February 26, 1931, (46 Stat. 1421; 40 U.S.C. § 258a (1970)); the Act of August 28, 1937, (50 Stat. 874; 43 U.S.C. § 1181a (1970)); the Act of July 23, 1955, (69 Stat. 367; 30 U.S.C. § 601 (1970)); the Act of July 26, 1955, (69 Stat. 374); and the Department of the Interior and Related Agencies Appropriation Act, 1972, (85 Stat. 229).

The United States has acquired title to Molalla Road by filing a Declaration of Taking. The road provides access to timberlands in the Molalla Watershed area. Substantial portions of those lands are owned by the government, Weyerhaeuser, and Crown in intermingled segments of a "checkerboard" pattern.

The federal lands are revested Oregon and California Railroad lands (O & C lands). They were granted to the railroad in 1866 (14 Stat. 239). The Chamberlain-Ferris Act (39 Stat. 218) revested title in the United States to the grant lands which had not been sold by the railroad. In 1937 Congress declared that the lands were to be managed for a "sustained yield" of timber for the benefit of dependent communities (50 Stat. 874).

Management of the timberlands by the Department of the Interior was complicated by the checkerboard ownership pattern. Owners of the intermingled

private lands built logging roads into the various watersheds. O & C timber was harvested by private bidders who needed to use those roads. Prior to 1950 the private owners discouraged competitive bidding on the O & C timber by refusing access to their roads or by imposing oppressive terms on their use.

The 28-mile Molalla Road, except for one mile, was financed and constructed by Weyerhaeuser, Crown, and their predecessors in interest. Eight miles of the road crossed federal land.

The Interior Department adopted regulations in 1950 designed to resolve the access problems. The key to the regulations was reciprocity. Operation of the regulations was triggered by a private party's application for a right-of-way permit across O & C land. 43 CFR 2812.1. The government could refuse such permits unless the party granted reciprocal access rights across its lands to the government. 43 CFR 2812.3. When possible, an advance agreement would be reached as to the terms of the reciprocal grant. One such term was "the consequent proportion of the capital costs of the [private party's] road system [which was] to be borne by the United States . . ." 43 CFR 2812.3-7. When negotiations failed, arbitration succeeded. Compensation by the government to the private party for construction and maintenance costs of his road was to be amortized on the basis of "the probable period of time, past and present, during which such road may be in existence, and the volume of timber which has been removed and the volume of timber

currently merchantable, which probably will be removed from all sources over such road." 43 CFR 2812.4-1. Such compensation was contemplated because of the recognized fact that "the value of standing timber is determined in significant part by the cost of transporting the logs to the mill . . . , [and that] the duplication of an existing road reduces the value of the federal and other timber which is tapped by the existing road." 43 CFR 2812.0-6(b). The regulatory scheme was intended to benefit all parties through communal use spurred by capital cost-sharing arrangements.

The regulations were not a panacea. They affected only parties who applied for a permit to cross O & C lands. Some owners could reach their land without crossing government land. Others had harvested their timber and lacked incentive to seek permits. In these situations the government could obtain access only through purchase of an easement or by condemnation.

The defendants were in neither situation at the time of condemnation. Molalla Road was constructed between 1943 and 1950, before adoption of the regulations. Part of the road crossed O & C land and was built under a fixed-term permit from the Bureau of Land Management (BLM). When the permits expired, new agreements (Agreements) were negotiated under the regulations (S-133 and 133b; S-393). These agreements gave the government and the defendants reciprocal, non-exclusive licenses over the portions of

Molalla Road on their respective lands. Effective February 24, 1953, they established the rights and obligations of the parties for the ensuing twenty-year period (S-393 was not effective until 1965). The government was required to pay defendants a fee for use of their roads based upon the amount of tributary timber removed over the road. This was not a complete cost-sharing arrangement since there were no provisions relating to tributary timber or to the replacement cost of the road. At the time, the parties assumed most of the timber would be removed by December 31, 1973, when the Agreements expired. Although a substantial volume was harvested during the ensuing years, it is reasonably probable that a significant volume of federal tributary timber remains to be removed over Molalla Road.

The government condemned Molalla Road on May 16, 1972, a year and one-half before the Agreements expired. The taking reserved free use of the condemned portions of the road to defendants, subject to their payment of pro rata maintenance expenses and to load limitations. The government obtained control over third-party use, although such parties own but a small acreage of Molalla Watershed land.

## ISSUE

The segregated issue before the Court is whether the reduction in value, if any, of defendants' lands in the Molalla Watershed resulting from the loss of opportunity to obtain payments for use of the con-



demned road for removal of federal timber may be considered in determining just compensation.

Defendants contend that under the Agreements and under agreements which inevitably would have succeeded them, the United States obligated itself to pay a proportionate share of the capital cost of Molalla Road in consideration for its use. Since it still held a substantial volume of timber at the time of taking, defendants contend it had not discharged its cost-sharing obligations. Any prospective purchaser of defendants' Molalla lands would attribute value to the "probability" of receiving future United States payments for use of the roads in removing its remaining timber.

Plaintiff contends that its need for use of the condemned portions of Molalla Road cannot be considered. It contends the Regulations have no bearing on the condemnation and do not affect the value of the road. Because defendants are reserved free use of the condemned portions, plaintiff considers the impact of the taking on the market value of defendants' remaining lands to be negligible. It claims that any enhancement in value due to its need for the roads must be excluded from compensation because its need is "special and extraordinary." I agree.

#### DISCUSSION

The Constitution guarantees defendants "just compensation" for the government's taking. But the

Fifth Amendment contains no precise formula by which such compensation is to be determined. Generally, market value is accepted as the most practical and accurate standard. *United States v. Miller*, 317 U.S. 369 (1943). Market value is a reflection of what "a willing buyer would pay in cash to a willing seller." *United States v. Miller, supra* at 374. Defendants contend that a "willing buyer" would pay a significant price in expectation of receiving payments for use of the condemned road for removal of federal timber. The government responds that even if this is true, this prospective income is not compensable because the government's need for use of the road is "special and extraordinary." *United States v. Cors*, 337 U.S. 325 (1949). Defendants readily agree that *Cors* is the controlling decision but submit the case to a different interpretation.

In *Cors*, the U. S. Government requisitioned a tugboat under Section 902 of the Merchant Marine Act of June 29, 1936, as amended, 49 Stat. 1985, 2015, c. 858, Aug. 7, 1939, 53 Stat. 1254, 1255, c. 555, 46 U.S.C. § 1242, 10 F.C.A. Title 46, § 1242. That act guaranteed owners of vessels requisitioned under its provisions "just compensation." The taking was prompted by the outbreak of World War II. The government challenged the compensation awarded by the Court of Claims as excessive because it failed to deduct from the value of the tug the enhancement of

<sup>1</sup> The Court did not decide whether this measure of compensation was identical with that of the Fifth Amendment for all purposes but considered it the same regarding the facts of the case at bar. *Cors* at 331-2.

value by causes which necessitated the taking. World War II created a dramatic rise in the government's need for vessels. Demand threatened supply, and the market reacted accordingly.

The Court recognized existence of "a principle which excludes enhancement of value resulting from the government's special or extraordinary demand for the property." *Id.* at 333. The essence of "just compensation" is fairness. Fairness demands exclusion of "hold-up values" created by emergency needs of the government. *Id.* at 333-334. This may also occur in several other situations: (1) "where the property has a special value to the owner because of its adaptability to his needs"; (2) "where it has a special value to the taker because of its peculiar fitness for the taker's project"; (3) where national emergency creates a sudden demand; (4) or where a government project exists which involves condemnations and the probability of a tract's inclusion in those takings enhances its market value. *Id.* at 332, citing *United States v. Miller*, *supra* at 375-379.

In the case at bar the government contends that its need for property is always "special and extraordinary." Plaintiff asserts that simply because it is the government, any enhancement in value of property caused by the government's participation in the market must be excluded from market value in determining just compensation.

Defendants say that the government is in the same position as private parties would be if the govern-

ment's lands were owned by them. They contend the government's need is neither special nor extraordinary because it has not been prompted by some unusual event. Defendants claim they are not seeking a "hold-up value," only the amount the BLM would probably pay for use of the road in light of its past practice and its regulations.

I reject the government's notion that its own participation in a market must be excluded from determination of value in all circumstances. The government's need is not always "special and extraordinary." Its needs meet that requirement when a national emergency or a government project "causes the market to be an unfair indication of value." *United States v. Cors*, *supra* at 333; *see United States v. Michoud Industrial Facilities*, 322 F.2d 698 (5th Cir. 1963); *United States v. 158.76 Acres of Land*, 298 F.2d 559 (2nd Cir. 1962); and *J. A. Tobin Construction Co. v. United States*, 343 F.2d 422 (10th Cir. 1965), *cert. den.* 382 U.S. 830 (1965); *Carlstrom v. United States*, 275 F.2d 802 (9th Cir. 1960).

Yet the government's need here is "special and extraordinary." The history of the government's ownership and management of the Molalla Watershed convinces me that its demand for private logging roads in that area is unique.

An existing market cannot be ignored simply because the government participates in it. *Olson v. United States*, 292 U.S. 246 (1934). But here the government is the only participant. Apparently defend-



ants have never exacted fees for use of Molalla Road from any party except the government. There is some timberland in the Molalla Watershed owned by third parties, but it is relatively small and there is no reasonable probability that a harvest of those lands would require use of the condemned roads.

Defendants propose that a market exists composed of prospective purchasers who would pay for the expectation of receiving road-use fees from the government. A similar situation occurred in *United States v. Whitehurst*, 337 F.2d 765 (4th Cir. 1964). Farm land was condemned to allow extension of a runway which had been constructed on an adjacent Naval Air Station eight years earlier. The condemned land had a borrow pit which contained a special type of sand. The government had made substantial purchases of the sand for construction of the runway and for subsequent improvements. Any market for the sand independent of the government was deemed conjectural by the court. The court held that the government's past and future demand for the same must be excluded in the determination of market value. The same reasoning applies here.

Defendant claims the case at bar is distinguishable on the ground that a private market exists which consists of "the opportunity to recoup from purchasers of government timber at least a portion of its fair share of the capital cost of the road." Such "recoupment" would be from the government, not from the private bidders who would harvest the timber. The

fact that the government may seek reimbursement from the bidders is immaterial.

It is also suggested that there is a private market consisting of buyers who would give consideration for the expectation of the government's road-use fees. This is analogous to an assertion that a market existed in *Whitehurst* consisting of buyers who would give consideration for the expectation of revenue from sales of sand to the government. *Whitehurst* specifically ruled that the government's need in such circumstances could not be considered. This is true even though the land is condemned in order to make use of existing improvements. *United States v. Buhler*, 305 F.2d 319 (5th Cir. 1962).

I do not necessarily agree with the *Whitehurst* decision. In the absence of contrary precedent, however, I feel compelled to follow its reasoning and cases cited therein. *United States v. Miller, supra*; *United States v. Cors, supra*; *John L. Roper Lumber Co. v. United States*, 150 F.2d 329 (4th Cir. 1945); *United States v. 158.76 Acres etc. in Town of Townshend etc., Vermont* 298 F.2d 559 (2nd Cir. 1962); and *United States v. Rayno*, 136 F.2d 376 (1st Cir. 1943), *cert. den.* 320 U.S. 776.

The government's management of the O & C forest lands is in the nature of a project designed to benefit dependent communities. Access to private logging roads is essential to the project's success. Consequently, the government's need for use of the roads is not equivalent to that of a potential private party



owning the same lands. The government is serving public interest with which private owners would not be concerned. Of course, the government could always be deemed to be serving public interest—at least indirectly—in any of its economic activities. But in this instance I consider the ultimate public interest and the forest management problems engendered by it “special and extraordinary” in light of the *Whitehurst* interpretation of *Cors*.

Defendants argue that theirs is a “proximity” case. If the United States condemns an area for a project and later enlarges the area by taking other lands, it must pay for any increment in value accruing to those lands because of their proximity to the original project unless the taking of those lands was contemplated from the beginning. *United States v. Miller, supra*. Defendants perceive that the proximity of their lands to the government lands brings them within that doctrine. This perception is blurred.

In *United States v. 172.80 Acres of Land*, 350 F.2d 957 (3rd Cir. 1965), the government condemned agricultural land to build a dam and reservoir. Two years later it acquired more land for a lakeside recreation development. In the interim, the land’s best use had become recreational rather than agricultural, and its market value increased. The value increase did not depend upon the government’s need for recreational land. Therefore the owners were entitled to compensation based on the enhanced valuation. Similarly, in *United States v. Fuller*, 409 U.S. 488 (1973), owners

were allowed compensation for the property value which resulted from proximity to a federal post office building. The enhanced value was not dependent upon the government’s potential need for the surrounding land but derived from the value to local businessmen of convenient mail service.

Any enhancement in value to defendants’ Molalla land due to its proximity to the government lands is directly and completely dependent upon the government’s needs. Unlike the *172.80 Acres* and *Fuller* cases, there is no outside market. The only notable timber owners in the area are the defendants and the United States. Therefore those cases do not apply.

“... [I]n ascertaining the market value of property taken in a condemnation proceeding the utility or availability of the property for the special purpose of the taker cannot be shown, if the taker is the only party who can use the property for that purpose.” *United States v. Boston, Cape Cod & N. Y. Canal Co.*, 271 F. 877 (1st Cir. 1921).

The timing of the government’s taking is disturbing. Under its Agreements with defendants, it was obligated to pay defendants for use of their roads for another year and one-half. The condemnation releases the government from those obligations. The government has provided no justification for its sudden action. Existing Agreements secured its right to use of Molalla Road, which is the only apparent reason for the condemnation. I am somewhat haunted by the guiding philosophy of *Cors*, which proclaimed “fair-

ness" to be the principle underlying exceptions to the market-value rule. In seeking to protect the government from a "hold-up," I may inadvertently reward the real bandit.

Yet the government could rightfully have condemned the Molalla Road in 1953 instead of entering into reciprocal rights agreements. The government's payments for road use was not compelled. Cancellation of those payments is not wholly unfair. Because the value of the use of the condemned roads is unique to the condemnor, I held for the plaintiff. *See United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1912).

Dated this 11th day of October, 1974.

/s/ Otto R. Skopil  
United States District Judge